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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-30[illegible]

RODNEY F. STICH,

Petitioner,

v.

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, pro se

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal constitutional provision involved is the Due Process Clause of the Fifth Amendment of the Constitution of the United States, which is set forth in Appendix D.

The following statutes, which are set forth in Appendix E are involved:

28 U.S.C. 2401

28 U.S.C. 2201

28 U.S.C. 1331

28 U.S.C. 1361

5 U.S.C. 701, 702, 703, 704, 706

28 U.S.C. 1406 (c)

Federal Aviation Act, Pub. L 85-726 (72 Stat. 797), Section 1007 (a)

42 U.S.C. 1985

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Federal Aviation Administration,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Rodney F. Stich, petition for a writ of certiorari to review the judgment of the United States Court of Appeals, rendered herein on April 7, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals is shown as Appendix A to this petition.

JURISDICTION

The Judgment of the U.S. Court of Appeals for which review is sought was entered on April 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(a) and 28 U.S.C. §§ 2101 (c). A petition for rehearing was filed on April 20, 1977. This petition was denied by order dated May 9, 1977. The mandate of the Court of Appeals was dated May 18, 1977, affirming the judgment of the U.S. District Court.

A petition to the U.S. Supreme Court for an extension of time was dated June 22, 1977.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented by this appeal.

1. Did the court err in refusing to accept mandatory jurisdiction of the first cause of action, seeking mandatory and prohibitory relief as to alleged gross abuse of discretion, culpable misconduct, actions outside the law, as to the Federal Aviation Administration's air safety activities.

2. Did the court err in dismissing the petitioner's first cause of action, by fabricating and falsely stating petitioner was asking the court to make an investigation of the FAA; implying that petitioner was not willing to proceed with this action; and then citing this false, fabricated excuse as taking this action out of the class of "justiciable controversy;" and thus claiming this was not a "justiciable controversy."

3. Is the federal court powerless to intervene when an executive agency is engaged in gross abuse of discretion, actions outside of the law, culpable misconduct, especially when such acts can be associated with the deaths of specific air travelers in specific air carrier crashes.

4. Did the court err when it dismissed petitioner's action for job reinstatement for federal employment, claiming the action should have been filed in the U.S. Court of Claims instead of the U.S. District court.

5. Did the court err when it dismissed the petitioner's action for back pay as a federal employee, claiming the action should have been filed in the U.S. Court of Claims instead of the U.S. District Court.

6. Did the U.S. Court of Appeals and the U.S. District court engage in a cover up of the serious misconduct that forms the basis

of these three causes of action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal constitutional provision involved is the Due Process Clause of the Fifth Amendment of the Constitution of the United States, which is set forth in Appendix C .

The following statutes, which are set forth in Appendix E, are also involved:

5 U.S.C. § 701 (Administrative Procedure Act, pertaining to government and government employees).

5 U.S.C. §§ 702 (right to judicial review to federal employees).

5 U.S.C. §§ 703 (Mandamus action involving government and government employees is function of district court).

28 U.S.C. §§ 1331 (mandatory jurisdiction conferred upon U.S. District courts, by law, to accept actions pleading federal question.

28 U.S.C. § 1361 (Action to compel an officer of the United States to perform his duty).

28 U.S.C. § 1406(c) Court's duty to transfer actions from U.S. District Court to U.S. Court of Claims if filed in the wrong court.

28 U.S.C. § 2201 (concerns elements of justiciable controversy).

42 U.S.C. § 1985. Ancillary jurisdiction. The United States District courts have ancillary jurisdiction to hear all matters when part of the claims are within its jurisdiction.

Pub. L 85-726; Stat. 797. Section 1007. Federal Aviation Act. Pertains to mandamus actions in district courts seeking mandatory and prohibitory writ if any statute, rule, regulation of the Act is being violated.

STATEMENT OF THE CASE

This case involves the attempts by the petitioner to obtain a mandatory and prohibitory writ directed to the Federal Aviation Administration, ordering the FAA to cease illegal coverup actions of major air safety irregularities and directing the FAA to comply with the statutes, rules and regulations of the nation's air safety laws that it is required to enforce; and to cease obstructing the lawful efforts of FAA safety inspectors who seek to comply with the nation's air safety requirements.

The petitioner is a former airline pilot and Navy Patrol Plane Commander of many years; holds numerous FAA pilot ratings including jet and other types of air carrier aircraft; is highly qualified in the field of air safety; and had been an FAA jet operations inspector and investigator for approximately five years.

The basis for this action is the widespread and long standing FAA misconduct discovered by petitioner while in the emply of the FAA

as an inspector/investigator.

Petitioner discovered the cover up of major air safety irregularities that were contrary to law and contrary to accepted industry practices, at certain favored air carriers, massive and illégal interference by key FAA management personnel with the lawfully required corrective actions, the destruction of official investigative reports citing major safety irregularities. These were and are deeply engrained into the FAA agency.

Petitioner's attempts to correct these irregularities, or at least attempt to comply with his own legal and moral job responsibilities, were met with harassment, intimidation, threats, and other acts, contrary to law.

Appeals to higher FAA officials, to other government agencies including the Civil Service Commission and the Department of Justice, produced no corrective actions.

The CAB Bureau of Safety was requested to

conduct an investigation as required by the Federal Aviation Act when a complaint is made, and it too refused.

While unsuccessful in obtaining corrective actions, petitioner developed a massive file showing the existance of extensive internal FAA misconduct in cover up of major air safety irregularities and the association of such refusal to act with several specific air diasters that the National Transportation Safety Board has refused to identify in its accident reports.

By means of government transcripts developed by petitioner's activities, the felonious cover up activities of the FAA are shown in detail, along with the deaths of the persons perishing from the air safety irregularities illegally covered up.

Meeting with a mass of executive agency blocks, apathy from the legislative branch, petitioner sought to obtain judicial relief in what developed into a major government and

air safety scandal, closely related to specific deaths in certain air carrier crashes.

Petitioner sought judicial adjudication of this controversy by using the mandamus functions of the federal court system. He initiated this use of the federal court system by first stating in a written memorandum that he would refuse to work in the illegal environment and that after the FAA took removal action, a complaint would be filed in court. The purpose of this was to get the allegations and evidence of FAA misconduct before the court, and obtaining a mandatory and prohibitory writ.

Petitioner then filed, within the statute of limitation period, three causes of action.

The first and primary cause of action seeks a mandatory and prohibitory writ directed to the FAA, forcing it to comply with the statutes, rules and regulations pertaining to air carrier safety.

Petitioner showed his readiness to proceed with this litigation by his ability to circumvent

the legal blocks put into his path. Exercise of petitioner's discovery rights were denied by the district court judge. Upon receipt of petitioner's revealing documents in request for admissions, and revealing interrogatories, the Department of Justice requested, and the judge accomodated, with an order stopping discovery.

Defendants filed a motion for summary judgment, or in the alternative, dismissal.

The district court judge stated in open court that this was a matter for Congress to investigate, and not a matter for the courts; and stated that the district courts cannot intervene in the discretionary activities of a government agency.

The failure of Congress to respond to its duties does not void the numerous statutory and case laws that give to the district courts the mandatory jurisdiction, and the responsibility to hear actions involving federal questions of this nature.

Petitioner's pleadings alleged to gross abuse of discretion, and the court has jurisdiction.

The mandatory jurisdiction of the United States District courts to hear mandamus actions directed to gross abuse of discretion by government agencies includes title 28 U.S.C. 2401; 28 U.S.C. 1361; the Federal Aviation Act, and others:

. Title 28 U.S.C. 1331 states that allegations of federal questions confers mandatory jurisdiction upon the U.S. District courts to hear mandamus actions. Petitioner's allegations in the pleadings raised the type of questions that confer mandatory jurisdiction upon the district courts.

Section 1007 of the Federal Aviation Act confers jurisdiction upon the district courts in mandamus actions when the allegations in the pleadings cite violations of any of the statutes, rules or regulations of the Act. That ofcourse, is the gist of petitioner's pleadings.

None of these statutes conferring mandatory jurisdiction upon the federal courts

qualify such jurisdiction with the point that Congress should have first crack at it.

Despite the comments by the district judge in pre-trial conferences about the seriousness of the discovery documents, despite his recognition of the tragic side effects of such cover ups, the action was dismissed.

Finding of facts and conclusions of law were requested by the petitioner, but the trial judge refused to elaborate on his dismissal action, and denied the request.

An appeal was filed with the U.S. Court of Appeals, and this appeal route was again utilized to submit still more revealing evidence into this action.

A stack of documents nearly a foot high were introduced in the form of affidavits, including parts of a manuscript that described in detail the FAA misconduct. At this point the courts had prima facie evidence supporting petitioner's allegations, and surely recognized the gravity of the matter.

From the evidence submitted into this action to date, the court can determine the seriousness of the subject matter, and the deaths that have been associated with it, along with the deaths that will continue to occur until this matter is properly exposed.

The U.S. Court of Appeals, therefore, had a recognizable problem of major national impact before it, in this action, plus supporting evidence.

Though by law a plaintiff does not have to prove his case in the pleadings to have the court decide to try it, in this action the court had supporting evidence, increasing its moral and legal responsibilities to assist in the prompt adjudication of the issues.

In open court, the position of the appeals court was that this was a matter for Congress to investigate. This is ofcourse a responsibility of Congress, but when brought before the court in the form petitioner has done in this action, the district courts have the mandatory

jurisdiction to adjudicate the matter. In open court, no other point was raised by the appeals court or the Department of Justice attorney.

The decision of the U.S. Court of Appeals was issued on April 7, 1977, and as to the first cause of action, the court stated:

> "To the extent Stich's action seeks a judicially-supervised investigation of the conduct of the FAA, he has failed to present a "justiciable controversy," i.e., an issue in a form "capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 95 (1968). The federal courts are neither equipped nor empowered to undertake congressional-style investigations into allegations of agency misconduct."

The U.S. Court of Appeals has interjected a false premise to circumvent the mandatory jurisdiction of the courts to hear this action.

Solely on the false basis that petitioner was asking the court to conduct an investigation

of the FAA, the court of appeals dismissed this serious action. The petitioner, in his petition for rehearing, strongly stated he had not, and was not, requesting the court to conduct an investigation.

The court ignored this statement, stuck to its statement for dismissing this action, obviously a fraudulent excuse, and refused to change its dismissal order.

A "justiciable controversy", as described by law in 28 U.S.C.A. 2201, and its footnotes, states that a justiciable controversy requires that a dispute must exist, and it can be safe to assume that there exists a dispute between the FAA and the petitioner; that the dispute must be more than mere disagreement or debate; and that it can be resolved by actions of the court.

All these elements exists in this action.

It appears to be an act of desperation by the appeals court to reach so far to fabricate an excuse for dismissing this key government scandal that is so easily proven false.

Also arising out of the underlying FAA misconduct was the petitioner's action for job reinstatement and back pay. The U.S. Court of Appeals stated: "The claim should have been made in the Court of Claims, not the district court."

The statutes contradicting this include title 28 U.S.C. 2401; title 28 U.S.C. 1361; title 5 U.S.C. 701, 702, 703; title 42 U.S.C. 1985;

By law, the district court should have transferred the actions for job reinstatement and back pay to the U.S. Court of Claims as provided by 28 U.S.C. 1406 (c), but this was not done.

Petitioner sought to correct the court's outrageous disregard of multiple statutory and case laws, and filed a petition for rehearing on April 20, 1977. By order dated May 9, 1977, the U.S. Court of Appeals stated: "The petition for rehearing is denied."

ARGUMENT

The U.S. District court refused to accept jurisdiction of this first cause of action involving agency misconduct, falsely claiming it had no power to intervene in the discretionary activities of a federal agency.

Petitioner plainly stated in his pleadings that it was a gross abuse of discretion, actions outside the law, culpable misconduct, closely associated with several major air carrier crashes. By specific statutory and case law, cited by petitioner and surely known to the federal judges, these were federal issues that conferred mandatory jurisdiction upon the court to hear the matter.

The broad constitutional powers of the district courts also conferred jurisdiction upon the court. In light of the gravity of the matter, the legal responsibility was augmented by the moral responsibilities to intervene and hear this action.

It was not necessary to seek these broad constitutional powers to hear the action petitioner brings before the court. The jurisdiction of the district courts to accept this first cause of action is given by 18 U.S.C. 1331, which provides that a district court must accept an action if the pleadings cite a controversy involving federal questions within the court's jurisdiction.

Abuse of discretion by a government agency falls within the court's jurisdiction.

Title 28 U.S.C.A. 1361 provides for action to "compel an officer of the United States to perform his duty." This section makes it clear that the federal district courts have the mandatory jurisdiction to order agencies of the federal government to perform their legal duties. It states:

> "District courts are open to prevent an administrative body, exercising police power, from exceeding its jurisdiction and from taking arbitrary and unreasonable action, and no special provision of law is

necessary to confer upon the courts authority already possessed by them under the Constitution. Rights of judicial review exists by statutes and under general powers of the court conferred upon them by the Constitution."

This authority and jurisdiction is clearly stated in the statutes, is continually being used by the district courts, and the statement that the court does NOT have authority is another example of the judicial coverup that is so obvious in this action.

Still further and specific authority specifically directed to air safety matters is seen by the Federal Aviation Act (Pub law 85-726; 72 Stat. 797;) Section 1007, which states: "If any person violates any provision of this Act,....any party in interest, may apply to the district court of the United States for the enforcement of such provision of this Act or of such rule, regulation, ..."

Title 28 U.S.C. 2401 confers jurisdiction of the district court to hear mandamus actions directed to government agencies for mandatory and prohibitory writs in the event of agency abuse of discretion, job reinstatement of federal employees.

The United States Court of Appeals is not so ignorant of such basic legal rights as these. It surely recognized that pet itioner's pleadings conferred mandatory jurisdiction upon the court.

The appeals court also, was not so naive or ignorant that it didn't recognize petitioner's action had very serious national implications, had serious overtones of fraud and felonious misconduct associated with the deaths cited by the petitioner. The court surely recognized that this was a government scandal that has gotten out of hand, and that any actions that held the risk of public discovery of these misdeeds were a threat to the three branches of government.

Incredibly, the federal court that has as its primary function the forcing of compliance with federal laws, acted to circumvent the federal laws, and fabricated a falsehood to circumvent the federal laws of mandatory jurisdiction.

It falsely stated in its dismissal action that petitioner was asking the court staff to make an investigation of the FAA, and that this request removed the action from being a "justiciable controversy."

In petitioner's petition for rehearing dated April 20, 1977, he wrote:

> "Appellant Stich is NOT asking the federal courts to conduct a judicial investigation. The judge, the clerk, and his secretary, would hardly be qualified to conduct such an investigation, and Stich, after many blocks put into his exposure attempts, would not trust the politically sensitive federal courts with such an investigation."

This denial did not affect the appeals court. It refused to change its position that petitioner

was asking the court to conduct the investigation of the FAA. In its May 9, 1977 order, it stated: "The petition for rehearing is denied."

Petitioner didn't show any inability to proceed with this action. The pleadings, the discovery, the affidavits, the methods of circumventing the mass of blocks put in his path by the Department of Justice and the judicial branch of government, and before that by the executive branch, his holding of hearings in the FAA, didn't indicate any signs of lack of ability. His pleadings and his grasp of federal law as shown in these pleadings, indicates his ability to proceed with this action.

We now have, if we didn't already have it with the district court, the naked judicial action in blocking this action, which many persons would identify as judicial fraud.

If only a governmental scandal was involved, this would be serious enough. But as the courts recognized, there were lives involved.

If only one branch of government had acted within the law, had not engaged in a cover up of the FAA, it is doubtful that such tragedies as the Paris DC-10 holocaust could have happened. It required the continuation of the FAA coverup for that greatest of all diasters to occur. And it required the cover ups by the three branches of government, the refusal to comply with moral and legal responsibilities, for the three branches of government to cover up for the FAA misconduct that has caused such a heavy loss of life in the air diasters cited in petitioner's pleadings.

The FAA misconduct is so deeply engrained, aided and abetted by the actions of the National Transportation Safety Board, that more crashes arising from the dispicable misconduct will continue to occur.

The judicial system, now, will have a part in such consequences, though it actually played a part long before this action was filed in the federal courts.

A Congressional investigation was certainly a concurrent need in this action, as to the governmental misconduct. It appears there is a need for a Congressional investigation as to the actions of the federal courts in blocking this action and in the apparent cover up of the major scandals involved.

If this type of cover up or acts done by the federal courts, were done by a private citizen, even though the citizen did not have the moral and legal responsibilities and public trust, the wrath of the Department of Justice and the Federal courts would be heaped upon him, with imprisonment a probability.

If done by an administration not popular with the liberal press or judicial system, the news media would have decimated the perpetrators.

These judicial actions are nothing but raw and naked misuse of government facilities, in defiance of law. Fortunately for the perpetrators, the public hasn't yet learned of this outrage.

The appeals court dismissed petitioner's action for job reinstatement and back pay, stating: "As to Stich's contention that the district court erred in dismissing his claim to job reinstatement and back pay from the FAA which discharged him after he refused to work until alleged irregularities in FAA air carrier safety check procedures were rectified: The claim should have been made in the Court of Claims, not the district court."

Title 5 of the United States Code pertains to government and government employees. Section 702 directs itself to the Right of review by government employees, and states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The same title, section 703, states: "Mandamus action is a function of district courts."

Obviously the action for job reinstatement is a function of mandamus actions and filed in the U.S. District courts.

Title 28 U.S.C. 1361 pertains to mandamus actions within the district courts to compel an officer of the United States to perform a duty owed to the plaintiff. (Title 28 USC 1361; added Pub. L. 87-748, 1 (a), Oct. 5, 1962, 76 Stat. 744).

Again showing the jurisdiction of the district court to hear actions concerning job reinstatement of federal employees:

Title 28 USCA 1361, note 34:

Note 34: EMPLOYMENT, MATTER RELATING TO:

A procedural avenue to reinstatement for an ex-employee of the federal government claiming to be the victim of improper discharge is petition for mandatory injunction or writ of mandamus directed to head of agency concerned commanding the reemployment of the petitioner. Beale v. Bount, C. A. Fla. 1972, 461 F. 2d 1133.

Note 17 states:

"Federal court could grant mandatory relief under this section in action brought by discharged civilian employee of the National Guard who alleged that his dismissal was an abuse of discretion. Chaudoin v. Atkinson C.A. Del. 1974, 494 F. 2d 1323."

Obviously, petitioner's action for job reinstatement was brought in the correct court. Disregarding, for the sake of argument, that the action for job reinstatement is vested in the U.S. District court, the doctrine and statutes pertaining to "ancillary jurisdiction" would have conferred upon the U.S. District court jurisdiction to hear the matter of job reinstatement and back pay.

The mandamus action in the district court directed to FAA air safety misconduct is the first and primary cause of action. The actions for job reinstatement and back pay would be ancillary to that first and primary cause of action.

As to ancillary jurisdiction, title 42 U.S.C. 1985 states:

> "Ancillary jurisdiction. The United States District courts have ancillary jurisdiction to hear all matters when part of the claims are within its jurisdiction."

Section 7366, chapter 86 of Jurisdiction and Venue, states: "

> "Under the concepts of pendent or ancillary jurisdiction a federal court in a proper case will assume jurisdiction over and dispose of matters which could not be brought before it if standing alone. The doctrine expands the jurisdiction of federal courts over subject matter and is anologous to the"logical relationship" doctrine applied to compulsory counterclaims and to the "clean-up" policy followed by courts of equity."

Moore's manual of Federal Practice and Procedures states of ancillary actions:

"When a federal court has jurisdiction over the main cause of action, it also has jurisdiction over any proceedings ancillary to that action, regardless of the amount of money involved, ..."

The action for job reinstatement stood on its own merits in the district court. If, however, it did not have statutory jurisdiction to be heard in the district court on its own, the ancillary jurisdiction would have conferred it upon the district courts.

This is no secret; case laws are in abundance showing the U.S. District courts deciding these actions.

Ancillary jurisdiction confers upon the district courts the action for back pay, as ancillary to either the first, or the second cause of action.

To further show the determination of the U.S. Court of Appeals that petitioner's actions come to a grinding halt, regardless

of the law, look at this: Statutory and case laws cited show the district court's jurisdiction to hear the matter of job reinstatement on its own in the district court. Ignoring these statutes, the statute and case law dealing with ancillary jurisdiction confers this matter to the district court.

Still another set of statutory and case laws would have saved petitioner's action for job reinstatement and back pay, which the U.S. Court of Appeals disregarded, and then when petitioner pointed to them in his petition for rehearing, the appeals court still ignored the lawful requirement.

IF the action for job reinstatement and back pay had by error been filed in the wrong court, and that it should have been filed in the U.S. Court of Claims as the appeals court stated, title 28 U.S.C. 1406 (c) provides for the court to transfer the action to the U.S. Court of Claims. It reads:

> "If a case within the exclusive jurisdiction of the Court of Claims is filed in a district

court, the district court shall, if it be in the interest of justice, transfer such case to to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.".

To avoid a possible abuse of this discretion as to transfer, and as stated in Moore's Manual Federal Practices and Procedures, the Supreme Court had protected the innocent party when the action is actually filed in the wrong court:

"...the Supreme Court has made it quite clear that transfer, where feasible, is the proper choice except for extraordinary circumstances. And this is the usual disposition. Also in contravention of the plain meaning of the language, courts of appeals have also assumed the authority of transfer.

The underlying rationale of the judicial decisions under this section is that dismissal for improper venue is a severe penalty; transfer to a proper venue

permits the action to go forward in the right place; it is in line with the practice of most state courts; courts should strive to decide and dispose of cases on the merits rather than on pleas in bar and pleas in abatement. Transfer also saves the plaintiff from the bar of the statute of limitations, if the period ran out after the filing but before the attack on venue. Barnett v. New York Central R. R. (1965) 380 US 424, 85 S Ct 1050, 13 L ed2d 941: Goldawr v. Heiman (1962) 369 US 463, 82 S Ct 913, 8 L ed2d 39; Internation-Rotterdam, Inc. v. Thomsen (CA4th, 1955) 218 F2d 941. Dismissal, therefore, should be reserved for that action where its institution in the wrong venue smacks of harassment or some other element of bad faith on the plaintiff's part. For example, in Parham v. Edwards, (SD GA, 1972) 346 F Supp 968.) the plaintiff instituted suit in a district in which neither venue nor personal jurisdiction of the defendant could be

obtained. The only proper district was one in which the applicable statute of limitations had already expired. Holding that the plaintiff had no right to benefit by the more liberal statute of limitations of the district in which suit was instituted, the court denied transfer and dismissed the action."

Obviously petitioner's action for job reinstatement and back pay do not fall within the areas that would justify or permit refusal to transfer to the U.S. Court of Claims.

This is further shown on page 1689, under Transfers 1406 (c):

"To alleviate this situation, Congress passed the Act of 1960. First, the Act amended section 1406 by adding subsection (c) as set out above. This provides that if the district court determines that a claim filed before it actually is in the exclusive province of the Court of Claims, it may order the case transferred to the Court of Claims, if this

be "in the interest of justice." Thus the same option, to transfer or dismiss, in the interest of justice, is given the district judge in transfer to the Court of Claims, as was provided in the 1949 amendment to section 1406 (a) in regard to transfers between district courts. And presumably for the same reason--to prevent abuse by a plaintiff who deliberately brings suit in the wrong forum. To make clear that the statute of limitations will not be affected by bringing the action in the wrong forum, the Act provides that upon transfer to the Court of Claims, "the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district courts."

Petitioner's request, in his petition for rehearing, that if the court does not allow this action to continue in the district court, as would be appropriate, that the second and third cause of action be transferred, to the court of claims, was refused.

REASONS FOR GRANTING THE WRIT

The reasons why the United States Supreme Court should issue a writ of certiorari would include the following:

1. Special and important reasons exist that have a broad national impact, especially in the area of air carrier safety. If the court's dismissal is allowed to stand, the serious government misconduct, especially within the Federal Aviation Administration and the National Transportation Safety Board, will continue to cause or allow such tragedies as the Paris DC-10 crash, the UAL Salt Lake City crash, and others, as described in petitioner's pleadings. As things now stand, the federal courts--incredibly, will have a role in the sacrificing of pawns in these air carrier crashes closely related to the FAA misconduct that is so deeply embedded into the philosophy and conduct of that agency.

Petitioner recognizes the problems that would face the Supreme Court. Any assistance petitioner receives increases the risk the pub-

lic may discover the contents of this scandal. If the public understands what it sees, then the judicial branch, along with the executive branch of government, are seen in a conspiracy against such persons as the cremated Bennett family in the Salt Lake City crash, and this hardly improves the image of the branch of government that is sworn to uphold the laws of the United States.

But the price for refusing to bring this matter to the open is a continuation of what has existed for many years, and the price has been horrendous sufferings by persons who didn't have a chance to protect themselves against this government conspiracy.

2. Disregard by the U.S. Court of Appeals of federal statutes and case law, affecting all three causes of action. This disregard could not have been judicial ignorance or mistake. It was deliberate, and the reasons are obvious.

3. Disregard by the U.S. District courtof the same statutory and case law, as well as

previous decisions of the United States Supreme Court.

4. Implications in lower court's ruling that federal courts cannot intervene in the activities of federal agencies, no matter how onerous, how illegal, how much an abuse of discretion. Ofcourse, the court's method of deciding these issues were in such a way that they will never be cited. But the fact remains, they did make such decisions and they did deprive petitioner of due process, of his day in court.

5. Disregarding the rights of those who serve as pawns in the conspiracy of silence to keep this scandal from the public. These pawns would include the 346 persons who perished in the Paris DC-10 crash, the UAL Salt Lake City crash, and many others.

6. Outright and fraudulent fabrication by the U.S. Court of Appeals of the excuse that petitioner is asking the court to conduct an investigation of the FAA, thus this is not a "Justiciable controversy,". This fabrication

was for one purpose and one purpose alone; to circumvent the mandatory jurisdiction of the district court to hear this action.

7. Apparent cover up by the U.S. District court and the U.S. Court of Appeals of a major government and air safety scandal.

The United States Supreme Court obviously is needed to supervise the actions of these two lower courts, and hopefully, the Supreme Court will not condone these actions.

Whatever restraint may be used to describe the actions of the U.S. District court and the U.S. Court of Appeals, one thing appears sure: the courts are engaging in a reckless disregard of the law with total indifference to the consequences being paid by the pawns in this reckless abuse of government facilities.

The courts, especially with the amount of affidavits introduced into this action, and from their observations on the federal bench, certainly recognize the consequences of even the smallest infraction of air safety laws.

The court has evidence of the relationship between the misconduct by the FAA and the subsequent deaths in tragic and unnecessary air carrier crashes.

The court has now openly entered into this relationship, and shown their colors. There will be more consequences arising from this refusal to respond for the national welfare, and now one can look to the courts also, incredible, to determine what part they played in the deaths that occurred.

If the courts that are looked to for enforcement of the laws can so openly act contrary to law, especially when the consequences are so great and horrendous, the problem takes on a frightening magnitude.

This petition is asking for a writ of certiorari. It is obvious, under these conditions, that it is extremely unlikely such a writ would be issued.

CONCLUSIONS

If it is gross abuse of the judicial process within the federal court system, matters of broad national interests affecting large segments of the population, disregard by the district court and the Court of Appeals of Supreme Court decisions, decisions by other federal courts, disregard of statutory and case law, this is a most appropriate matter for the United States Supreme Court to review.

The Supreme Court has managed to involve itself in matters that some consider trivia. The magnitude and implications of the matters within this action certainly warrant some consideration by the United States Supreme Court.

A writ of certiorari is requested.

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Petitioner

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APPENDICES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODNEY F. STICH, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, *Defendants-Appellees.*	No. 75-2300 MEMORANDUM

[April 7, 1977]

On Appeal from the United States District Court for the Northern District of California

Before: CHOY and KENNEDY, Circuit Judges, and FERGUSON,* District Judge.

We are inclined to agree with Stich that he has exhausted his administrative remedies, that he has standing to seek mandamus and that the action is not barred by the applicable statute of limitations. But we need not decide those points because we hold that the district court properly dismissed Stich's petition for a writ of mandamus.

To the extent Stich's action seeks a judicially-supervised investigation of the conduct of the FAA, he has failed to present a "justiciable controversy," i.e., an issue in a form "capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The federal courts are neither equipped nor empowered to undertake congressional-style investigations into allegation of agency misconduct.

*Honorable Warren Ferguson, United States District Judge for the Central District of California, sitting by designation.

As to Stich's contention that the district court erred in dismissing his claim to job reinstatement and backpay from the FAA which discharged him after he refused to work until alleged irregularities in FAA air carrier safety check procedures were rectified: The claim should have been made in the Court of Claims, not the district court.

In *Mathis v. Laird*, 483 F.2d 943 (9th Cir. 1973) (per curiam), it was held that an action seeking reinstatement and backpay from the Air Force was "essentially one for a money judgment" although cast as an action in the nature of mandamus and as a request for declaratory relief. Since the amount claimed exceeded $10,000, the panel noted that the Court of Claims had exclusive jurisdiction under 28 U.S.C. §§ 1346(a)(2), 1491. Stich seeks reinstatement with "full backpay." Since he has been off the job from sometime in 1967, the amount he seeks clearly exceeds the Tucker Act limit of $10,000. 28 U.S.C. § 1346(a)(2). Therefore, Stich should have filed his action in the Court of Claims.

Nor did the district court have jurisdiction, as Stich argues, under 42 U.S.C. § 1985(3) and 28 U.S.C. § 1343(1). The essential elements of a cause of action under the Civil Rights Conspiracy statute include that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Stich has alleged a conspiracy to deny him of rights under the First Amendment, presumably the right to speak out about FAA derelictions of duty, but he has not alleged the type of class-based deprivation against which § 1985(3) protects.

Because the district court lacked subject matter jurisdiction over Stich's action, it did not err in dismissing.

AFFIRMED.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-13-77—410

Petition for Rehearing by Appellant

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Rodney F. Stich,

Plaintiff and Appellant

v.

United States of America,
Federal Aviation Administration,

Defendants and Appellees

This is a petition for rehearing from the memorandum decision of the United States Court of Appeals. The decision of the appeals court was to uphold the dismissal by the United States District court as to appellant Stich's three causes of action.

The underlying issues, the crux of this action before the federal court, are the allegations that a small but controlling group within the Federal Aviation Administration has engaged in a con-

tinuing fraud in covering up for major air safety irregularities at certain favored air carriers and companies, and that identifiable acts of misconduct, including criminal acts that should have been prosecuted by the Department of Justice, were directly involved in some of the worst air carrier crashes.

Appellant Stich discovered these serious irregularities as part of his official duties as a investigator/inspector for the Federal Aviation Administration, and accumulated numerous official government documents to prove their existance and also their relationship to subsequential serious air carrier crashes. Several of these crashes are described in detail within these pleadings, as examples of how they were not exactly "accidents."

Appellant Stich has alleged that the wrongful actions were covered up, by other government agencies, apparently seeking to keep the long standing misconduct and the associated deaths,

from the public. The fear of the consequences of an enraged public may explain why so many government agencies and different branches of government will not at this late stage step in to meet their moral and legal responsibilities.

Those who aided in the conspiracy to keep this matter from the public includes, among others, the National Transportation Safety Board and the Department of Justice.

In one air carrier tragedy, the link between cause and consequences is very well documented in the affidavits appearing as part of the record in this action. Helping to worsen an already serious government fraud, the National Transportation Safety Board is shown as investigating a crash which, by its own fraud and misconduct, it helped bring about. That crash was the UAL Salt Lake City tragedy, a classic in air carrier crashes that should never have happened.

Fourty three persons were cremated in that crash, including Mrs. Bennett and her two daugh-

ters, no match for government fraud and arrogance that helped to guarantee their fate.

To show the long standing nature of this misconduct, the arrogance of the government participants in this fraud, appellant Stich describes in detail the consequences over a period of years, using as the start the worst air diaster of the sixties, the DC-8 that crashed into New York City, with brief reference to the great holocaust, the Paris DC-10 tragedy.

As part of the appeal process before the United States Court of Appeals, and to support these allegations--and also to thwart what appellant Stich anticipated would be a judicial block, Stich submitted into this action a stack of affidavits, documents and other writings, supporting the allegations.

These writings are virtually prima facie evidence supporting the strong allegations of government misconduct and the associated air diasters. The Court of Appeals is astute enough to recognize the validity of these documents

and what they indicate. In no way could the federal courts have failed to grasp the gravity of the matter shown within this action; the consequences that have occurred in crashes and deaths; and the continuation of these tragedies unless an open exposure occurs.

Appellant Stich seeks, in his first and primary cause of action, a writ of prohibitory or mandatory injunction from the federal court, directing the Federal Aviation Administration to comply with the federal laws and their own safety directives. Similar writs would also be required for the National Transportation Safety Board and other government agencies that conspired to keep this fraud from being exposed.

The jurisdiction and the responsibility of the federal courts to hear and adjudicate this action is without question. Appellant Stich's pleadings recite numerous statutory and case law point and authorities, leaving no doubt that the federal courts have the jurisdiction--and the responsibility--to allow this action to be heard.

Appellant Stich has the right to be heard, and this is not a discretionary court decision. The statutory and case law citations listed by appellant Stich makes it clear that the federal courts can not decline jurisdiction where mandamus is sought and there are allegations such as gross abuse of discretion, actions outside of the law, culpable misconduct.

The court has a responsibility to a plaintiff, especially if the plaintiff has no suitable alternative. Statutory and case law makes the court's responsibility to the plaintiff very plain, that the court's jurisdiction is broad, and that in the sense of justice, the court must be responsive to see that justice does prevail.

It is interesting to note that from the time of the oral argument in open court before the United States District Court, not a word has been written or spoken that questioned the validity of Stich's allegations. Actually, the implications were that the allegations were essentially true.

The United States Court of Appeals stated in its hearing decision that appellant Stich has standing to seek mandamus, as it stated: "... /Stich/ has standing to seek mandamus and that the action is not barred by the applicable statute of limitations."

But then, the appeals court dismissed the three causes of action, citing simple excuses that are thoroughly without merit, and which, by a simple examination of the statutory and case law, are contrary to law.

As to the first and primary cause of action which involves specific fraud and criminal acts in covering up for very serious air safety violations, and the subsequent crashes associated with these wrongful acts, the appeals court devoted only eight lines of discussion, and these were a sham. It wrote:

> "To the extent Stich's action seeks a judically-supervised investigation of the conduct of the FAA, he has failed to present a "justiciable controversy," i.e., an issue

in a form "capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 95 (1968). The federal courts are neither equipped nor empowered to undertake congressional-style investigations into allegations of agency misconduct."

Appellant Stich is NOT asking the federal courts to conduct a judicial investigation. The judge, the clerk, and his secretary, would hardly be qualified to conduct such an investigation, and Stich, after many blocks put into his exposure attempts, would not trust the politically sensitive federal courts with such an investigation.

Appellant has made it clear by word and deed deed that he is ready, willing and able to proceed with presenting this matter for adjudication.

The sole excuse given by the United States Court of Appeals to dismiss this very serious first and primary cause of action is groundless. Stich has not asked the court to make an investigation,

and the court has the capability to hear and understand this action, and it has the authority and responsibility to issue the relief requested.

Appellant Stich expected a judicial block, preventing the public from hearing of this matter. This simple and groundless excuse now shows how this blockage is being handled. Appellant Stich disagrees with the appeals court and raises the following points:

1. Appellant Stich has not asked the court to conduct a judicial investigation of this matter, this "request" being the core of the appeals court "justification" for dismissal.
2. The United States District court has the legal responsibility to take jurisdiction of this matter; it does not involve any discretion upon the part of the court. This responsibility is clearly cited, and is of long standing, as shown by title 28 USCA 1331. When allegations are made in the pleadings of involvement of federal

statutes, the district court must accept jurisdiction. The court surely knows this.

3. As to the "justiciable controversy" excuse, implying the court can not resolve this matter through judicial process, this argument has no validity. The court, first of all, has the jurisdiction to accept this action. Appellant Stich has shown his capability of pursuing this matter with vigor, having surmounted the blocks of the executive branch of government and the judicial blockages to this date. By legal ingenuity he forced into this record revealing documents, using discovery, even though the court, as expected, ordered discovery halted. He has introduced a stack of affidavits and revealing documents, over ten inches high, prima facie evidence in the records supporting the allegations.

The appeal record contents to date shows his aggressiveness and capability to pursue

this first cause of action. What he has to introduce into the trial would include many official government documents accumulated as part of his official duties as an investigator for the federal government.

4. The federal courts--namely the United States District court, has the power to issue orders directing federal agencies to comply with their lawful responsibilities. This authority is so well stated in a mass of statutory and case laws, a fundamental rights of the federal courts, included in numerous citations within these pleadings, that any question about the court's ability in this area would be ludicrous. Title 28 USCA 2201, note 95, says of justiciable issues: "The test of a "justiciable controversy" within this section is whether the facts alleged under all the circumstances show that there is a substantial controversy between the parties

having adverse legal interest of sufficient immediacy and reality...Henry L. Crowley & Co. v. Phillips Laboratories. D.C.N.Y. 1952, 104 F. Supp. 840.

The gist of the various citations is that there must be a real controversy, the parties have adverse legal interests, of sufficient immediacy.

From a legal point of view, the court's position is without any foundation. From a moral point of view, the court's position is outrageous.

The court's jurisdiction to hear this case is positive and cannot be tampered with by fabricating such excuses as appellant is asking for a judicial investigation.

While appellant Stich is angered at this blatant misrepresentation by the court, the contempt shown by the court for the rights of the prior victims, or of their next of kin, the contempt for those that will continue to die as the perpetrators, and those guilty of criminal coverup, are free to adversely affect the lives of

still more unsuspecting and helpless members of our nation.

The United States Court of Appeals and the United States District /court/ are making a shambles and mockery of our justice system, and are a key element in the continued consequences that will be suffered. Slow and anticipated cremation and mutilation is a terrible way to die; the court is insuring, by its blatant and arrogant conduct that certain unknown members of the community will meet this fate.

The federal courts are sophisticated from long experience with accident litigation to recognize the cause and effect relationship of even the most minute violation or improper conduct in the highly sensitive area of air safety. The court certainly recognizes the effects following judicial coverup of these acts of government fraud.

The court's dismissal of the first cause of action, in light of the court's knowledge of the supporting documents entered into this action

cannot be considered "judicial error." If a member of the public responded in the same manner, even though not holding the public trust that is vested in the judiciary, they would be guilty of aiding and abetting, of conspiracy--crimes per se. How then, could the conduct of the judicial branch be described? Judicial error?

The United States Court of Appeals uses the excuse that Congress should investigate this matter. But appellant Stich made it clear to the appeals court during oral arguments that Congress already knows about the scandal, key members of Congress were involved in the coverup at a time when, had they acted as they were legally and morally required to do, such persons as Mrs. Bennett and her two daughters would have been spared the fate of cremation in the Salt Lake City tragedy.

This is a poor excuse. Congress isn't about to expose it's involvement in such tragic crashes as described in these pleadings.

For all practical purposes the United States Court of Appeals is the court of last resort. By refusing to act as clearly required by a multitude of statutory and case laws, by refusing to accept its moral responsibilities, knowing that Congress will not investigate, the court is sealing the fate on many innocent persons.

Such tragedies as the recent DC-10 diaster with its 346 persons dead, probably could not have occurred without the prior coverup of the long-standing FAA fraud. The same Western Region Federal Aviation Administration shenigans that were responsible for so many of the horrendous tragedies described in appellant's pleadings were behind the coverup involving the Paris DC-10 crash. The federal courts played a part in the earlier coverup that permitted the FAA scenario to remain unchanged. Good show!

Turning now to the second and third cause of actions which pertains to job rein-

statement within the FAA and back pay, we have the same type of judicial ploy. These two causes of action arose out of the misconduct by the FAA. Unable to obtain the legal response out of various agencies within the executive branch, unable to get any response from the legislative branch, and seeking to circumvent the many blocks put in Stich's exposure attempts, he put his job on the line to force the issues into federal court.

Over ten years of hard work, costs and losses of pay approaching $500,000, were involved as Stich could no longer tolerate the continuing deaths fostered by a government supported gang of thugs controlling the Federal Aviation Administration in an illegal manner.

The United States District court has jurisdiction to adjudicate the second and third cause of action from authority arising in several statutes. This jurisdiction is not discretionary, it is mandatory.

The statutory and case law authorities for the United States District court's jurisdiction over actions for job reinstatement have been stated within these pleadings, and title 28 USCA 2401 refers to this authority. This jurisdiction has existed for years. Within the last few years, this exclusive jurisdiction was changed, in that jurisdiction was also conferred upon the United States Court of Claims when that court was also hearing actions for back pay.

Until that change in jurisdiction was made, a federal employee seeking both back pay and job job reinstatement had to file an action in the United States Court of Claims for his back pay, under authority which includes 28 USC 2501, and another claim, being a mandamus action, in the United States District court for job reinstatement, under jurisdiction which includes 28 USC 2401.

Mandamus actions for job reinstatements in the United States District courts are still proper.

There are still other authority showing that appellant Stich's second and third cause of action was filed in the proper court, the United States District court, and that the district court has the obligation to take jurisdiction.

Under ancillary jurisdiction, described in 42 USC 1985, it states: "Ancillary jurisdiction. The United States District courts have ancillary jurisdiction to hear all matters when part of the claims are within its jurisdiction."

And in Moore's Manual of Federal Practice and Procedures, it states of ancillary actions: "When a federal court has jurisdiction over the main cause of action, it also has jurisdiction over any proceedings ancillary to that action, regardless of the amount of money involved, the citizenship of the parties, or the existance of a federal question in the ancillary suit."

The primary cause of action is the mandamus action seeking district court writs/ orders directed to the Federal Aviation Ad-

ministration. The allegations pleaded confers nondiscretionary jurisdiction upon the district court.

The cause of action seeking back pay would also fall within the ancillary jurisdiction, though it would attach to either the mandamus action seeking a writ ordering the FAA to comply with the law; or the mandamus action seeking job reinstatement.

As previously explained by appellant Stich in the pleadings, the United States District court has jurisdiction over the first cause of action which is nondiscretionary; the district court has jurisdiction over the second cause of action--job reinstatement, in a mandamus action, and also from ancillary jurisdiction; and the district court has jurisdiction over the third cause of action--back pay, as ancillary jurisdiction to the first cause of action, or as ancillary to the second cause of action. Accepting jurisdiction is not discretionary.

As to these last two causes of action, the United States Court of Appeals deliberately ignores these statutory and case law citations and in dismissing them and the cause of action, states: "The claim should have been made in the Court of Claims, not the district court."

Ignoring for a moment that the United States District court did have, does have, non-discretionary jurisdiction over the second and third cause of actions, if these two actions had been filed in the wrong court and should have instead been filed in the United States Court of Claims under authority of title 28 USC 1406. Referring to Moore's Manual of Federal Practice and Procedure, section 7.13 (c), it states:

> "(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the district court."

As this section points out, and the court of appeals well knows, by dismissing the action as was done by the appeals court, appellant Stich is improperly denied his statutory and constitutional rights and smacks of gross abuse of discretion upon the part of the United States Court of Appeals.

It is difficult to comprehend how the United States Court of Appeals could be so ignorant as to these basic statutory and case laws, especially since they were cited in appellant's pleadings. They are so basic to the operation of federal court matters.

In the light of the scandalous nature of this action, in the light of the repeated blockage encountered by appellant Stich as he sought to expose this fraud, questions about the motives of the appeals court are naturally raised.

For the jurists to misstate the alleged justification for dismissal, in light of all the errors, it would be like a pilot of an air

carrier aircraft taking off without sufficient fuel to reach his destination. Neither situation appears to have any merit.

In summary, the dismissal action of the three causes of action by the next to the highest court in the land; the United States Court of Appeals, has onerous implications.

Certiorari will be sought from the United States Supreme court, a petition to Congress for a review of the court's action in light of the serious implications, and reaching the public via other means to show how they have been victimized, are planned actions.

Appellant Stich is requesting that the United States Court of Appeals reconsider, and reverse its dismissal action as to all three causes of action.

Dated: April 18, 1977

Rodney F. Stich
In Propria Persona

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 9, 1977

RODNEY F. STICH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
FEDERAL AVIATION ADMINISTRATION,

Defendants-Appellees.

No. 75-2300

ORDER

Before: CHOY and KENNEDY, Circuit Judges, and FERGUSON, * District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment 5

No person shall be...deprived of life, liberty, or property, without due process of law; ...

Amend 5. This clause protects vested rights from destruction by the federal government. Darlington v. Board of Councilmen of City of Frankfort, 1940, 140 S.W. 2d, 392, 282 Ky. 778.

APPENDIX E

28 U.S.C. 1331 (citing FCA 28 USC 1331). Jurisdiction: Court could not properly dismiss suit unless record created a legal certainty that controversy within its jurisdiction was not involved. (1886) Barry v. Edmunds, 116 US 550, 29 L. ed 729, 6 SCR 501.

Note 238: Jurisdiction of district court is to be determined by allegations of complaint. Moore v Chesapeake & O. R. R. Co. (1934) 291 US 205, 78 L Ed 755, 54 S Ct 402.

Note 238: Allegation of complaint generally. "Where bill sets up violation of federal constitution, federal court must take jurisdiction where it determines that question made in good faith is presented to it for its decision. Illinois C. R. Co. v. Adams(1901) 180 US 28, 45 L. Ed 410, 21 S Ct 251; Hays v Port of Seattle (1920) 251 US 233, 64 L Ed 243, 40 S Ct 125.

28 U.S.C.A. 1361

Note 34. EMPLOYMENT, MATTERS RELATING TO

A procedural avenue to reinstatement for an ex-employee of the federal government claiming to be the victim of improper discharge is petition for mandatory injunction or writ of mandamus directed to head of agency concerned commanding the reemployment of the petitioner. Beale v. Blount, C.A. Fla. 1972, 461 F.2d 1133.

Note 17. "Federal court could grant mandatory relief under this section in action brought by discharged civilian employee of the National Guard who alleged that his dismissal was an abuse of discretion. Chaudoin v. Atkinson, C.A. Del. 1974, 494 F.2d 1323."

28 U.S.C. 1361 Mandamus action. Compels an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff. "

28 U.S.C.A. 1361 Action to compel an officer of the United States to perform his duty.

"District courts are open to prevent an administrative body, exercising police power, from exceeding its jurisdiction and from taking arbitrary and unreasonable action, and no special provision of law is necessary to confer upon the courts authority already possessed by them under the Constitution. Rights of judicial review exists by statute and under general powers of the court conferred upon them by the Constitution."

Federal Aviation Act, Public Law 85-726 (72 Stat. 797), Section 1007. "If any person violates any provisions of this Act, ... any party in interest, may apply to the district court of the United States...for the enforcement of such provision of this Act or of such rule, regulation, ..."

Improper Venue: 28 U.S.C. 1406 (Moore's Manual Federal Practice and Procedures).

(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the district court.

The similarity of language and purpose of section 1404 and section 1406 have caused the courts to give parallel construction, for example, to the question whether the "interest of justice" will be served by transfer(Dubin v. United States (CA5th, 1967) 383 F2d, 813; Internation-Rotterdam v. Thomsen (CA4th, 1955) 218 F2d 514) and to the question of the applicability to special venue situations. But under section 1406, unlike section 1404 (a), the trial judge theoretically* and under the statutory language has the discretion to choose between

dismissal and transfer even when there is another federal forum available. Nevertheless, the Supreme Court has made it quite clear that transfer, where feasible, is the proper choice * except for extraordinary circumstances(Goldawr v. Heiman (1962) 369 US 463, 82 S Ct 913, 8 L ed2d 39; Burnett v New York Central R. R. (1965) 380 US 424, 85 S Ct 1050, 13 L ed2d 1491). And this is the usual disposition. Also in contravention of the plain meaning of the language, courts of appeals have also assumed the authority of transfer (Koehring Co. v. Hyde Construction Co. (1966) 382 US 362, 86 S. Ct 522, 15 L ed2d 416; Panhandle Eastern Pipe Line Co. v. FPC (CA8th, 1965) 343 F2d 905; Panhandle Eastern Pipe Line Co. v. FPS (CA8th, 1965) 343 F2d 905; Panhandle Eastern Pipe Line Co. v. FPC (CA10, 1964) 337 F2d294).

The underlying rationale of the judicial decisions under this section is that dismissal

for improper venue is a severe penalty; transfer to a proper venue permits the action to go forward in the right place; it is in line with the practice of most state courts; courts should strive to decide and dispose of cases on the merits rather than on pleas in bar and pleas in abatement. Transfer also saves the plaintiff from the bar of the statute of limitations, if the period ran out after the filing but before the attack on venue. (SD Ga, 1972)346 F Supp 968.) Dismissal, therefore, should be reserved for that action where its institution in the wrong venue smacks of harassment or some other element of bad faith on the plaintiff's part. For example, in Parham v. Edwards, the plaintiff instituted suit in a district in which neither venue nor personal jurisdiction of the defendant could be obtained. The only proper district was one in which the applicable statute of limitations had already expired.

Holding that the plaintiff had no right to benefit by the more liberal statute of limitations of the district in which suit was instituted, the court denied transfer and dismissed the action."

28 U.S.C.A. 2201, note 96 states of a "justiciable controversy:"

"The test of a 'justiciable controversy' within this section is whether the facts alleged under all the circumstances show there is a substantial controversy between the parties having adverse legal interest of sufficient immediacy and reality...

A "controversy" to be "justiciable" within former section 400 of this title, had to be definite and concrete, touching legal relations of parties having adverse and substantial controversy admitting of specific relief through decree of conclusive character. Maryland Casualty Co. v. Hubbard, D.C. Cal. 1938, 22 F. Supp. 697."

42 U.S.C. 1985: Ancillary jurisdiction. The United States District courts have ancillary jurisdiction to hear all matters when part of the claims are within its jurisdiction."

Moore's manual of Federal Practice and Procedures states of ancillary actions: "When a federal court has jurisdiction over the main cause of action, it also has jurisdiction over any proceedings ancillary to that action, regardless of the amount of money involved, the citizenship of the parties, or the existance of a federal question in the ancillary suit."

Under Jurisdiction and venue, section 7366, chapter 86, it states: "Under the concepts of pendent or ancillary jurisdiction a federal court in a proper case will assume jurisdiction over and dispose of matters which could not be brought before it if standing alone. The doctrine expands the jurisdiction of federal courts over subject matter and is anologous to the 'logical

relationship" doctrine applied to compulsory counterclaims and to the "clean-up" policy followed by courts of equity."

* Underscoring added for emphasis.

Dismissal Order of District Court

In the United States District Court

For the Northern District of California

Civil No. C-74-0982-RHS

ORDER

Rodney F. Stich,

Plaintiff,

v.

United States of America, Federal Aviation Administration, et al.,

Defendants.

The matter having come regularly on for hearing before the Court on the defendants' motion to dismiss or in the alternative for summary judgment, and the respective parties having been afforded the opportunity of being heard and the Court fully advised in the premises, and the matter duly submitted:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The defendants's motion to dismiss be and it is hereby granted;
2. The complaint and action are hereby dismissed as to said defendants.

3. The respective parties shall bear their own costs herein.

Dated: Feb 28 1975

/s/ Robert H. Schnake
United States District Judge

Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

No. 77-30

In the Supreme Court of the United States

OCTOBER TERM, 1977

RODNEY F. STICH, PETITIONER

v.

UNITED STATES OF AMERICA
AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-30

RODNEY F. STICH, PETITIONER

v.

UNITED STATES OF AMERICA
AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner was formerly employed as an air carrier operations inspector by the Federal Aviation Administration ("FAA"). In April 1967, the Chief of the FAA's National Flight Inspection Division informed petitioner by letter that he was being separated from service effective March 30, 1967, because he had abandoned his position (Exhibit A to record on appeal, pp. 76-77). The letter set forth as grounds for the separation that petitioner had advised his supervisor of his intention to leave the agency by "just walk[ing] off rather than resigning," had submitted a memorandum dated March 30, 1967, in which he stated that he had justification for leaving, and in fact had left (*id.*, at p. 79).

Petitioner appealed from the FAA's decision to the Dallas Regional Office of the Civil Service Commission ("CSC"), which found that petitioner had left his job of his own volition by refusing to report for work and that such refusal amounted to an abandonment of his position. On June 7, 1968, the CSC's Board of Appeals and Review affirmed the decision of the Dallas Regional Office.

Nearly six years later, on May 8, 1974, petitioner filed suit in the United States District Court for the Northern District of California, seeking reinstatement to his position as an air carrier operations inspector with the FAA and back pay to March 30, 1967. Petitioner also alleged numerous acts of misconduct regarding the FAA's air safety operations and sought a judicially supervised investigation of this alleged misconduct. On February 28, 1975, the district court granted the government's motion to dismiss for failure to state a claim upon which relief could be granted. The court of appeals affirmed that decision on April 7, 1977, holding that the district court lacked subject matter jurisdiction over petitioner's claim. The court reasoned that insofar as petitioner was seeking reinstatement and back pay in excess of $10,000, the Court of Claims had exclusive jurisdiction to consider that claim, and that to the extent petitioner was seeking a judicially supervised investigation of FAA conduct, he had failed to present a controversy capable of judicial resolution (Pet. App. 1a).

1. The court of appeals correctly concluded that the district court lacked jurisdiction to consider petitioner's claim for reinstatement and back pay in excess of $10,000. The Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, grants the Court of Claims exclusive jurisdiction to consider a claim for reinstatement and back pay in excess of $10,000. *Mathis* v. *Laird*, 483 F. 2d 943 (C.A. 9); *Polos*

v. *United States*, C.A. 8, Nos. 76-1348 and 76-1483, June 16, 1977; *International Engineering Co.* v. *Richardson*, 512 F. 2d 573 (C.A.D.C.), certiorari denied, 423 U.S. 1048; *Carter* v. *Seamans*, 411 F. 2d 767 (C.A. 5).[1]

Even if the jurisdiction of the Court of Claims were not exclusive, the numerous statutes on which petitioner relies to support district court jurisdiction would not avail him here. This Court has recently held that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, is not an independent source of jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99. Mandamus under 28 U.S.C. 1361 is inappropriate where an alternative remedy, such as the institution of suit in another court, exists. *Ex Parte Baldwin*, 291 U.S. 610, 614. The Civil Rights Act, 17 Stat. 13, as amended, 42 U.S.C. 1985, provides no jurisdiction because, as the court of appeals correctly concluded (Pet. App. 2a); petitioner has not alleged any racial or class-based deprivation against which the Civil Rights Act protects. *Griffin* v. *Breckenridge*, 403 U.S. 88, 102. And no federal question jurisdiction exists under 28 U.S.C. 1331 for a suit against the United States in the absence of a clear waiver of sovereign immunity. *United States* v. *King*, 395 U.S. 1, 4. As Congress has expressly granted jurisdiction for federal employee discharge cases to

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[1]Under a 1972 amendment to the Tucker Act, the Court of Claims has the power to grant both back pay and reinstatement. Thus, 28 U.S.C. (Supp. V) 1491, as amended, provides in pertinent part:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

the Court of Claims whenever the back pay sought exceeds $10,000, a waiver of sovereign immunity for such suits under 28 U.S.C. 1331 cannot reasonably be found.[2]

2. The district court also correctly dismissed petitioner's request for a judicially supervised investigation of the FAA. As the court of appeals noted, a request for open-ended judicial oversight of an agency's activities fails "to present a 'justiciable controversy,' *i.e.*, an issue in a form 'capable of resolution through the judicial process.' *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)" (Pet. App. 1a).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

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[2]Alternatively, petitioner urges that the district court should have transferred the case to the Court of Claims under 28 U.S.C. 1406(c). Petitioner, however, never requested such transfer in the district court. Moreover, a district court need transfer a case to the Court of Claims only if the transfer would be "in the interest of justice." 28 U.S.C. 1406(c). Because petitioner's separation from service was due to his own abandonment of his position, and petitioner delayed almost six years before asserting his claim for back pay and reinstatement, the district court could reasonably conclude that a transfer was not "in the interest of justice." See *Haas* v. *Overholser*, 223 F. 2d 314 (C.A.D.C.).